Supreme Court of the United States

OCTOBER TERM, 1942.

No. 947

GERD H. HENJES,

Petitioner,

—against—

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, COMMERCIAL UNION ASSURANCE COMPANY LIMITED OF LONDON, ENGLAND, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, THE HOME INSURANCE COMPANY, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

ROBERT F. DONOGHUE,
BENJAMIN LEWIS,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Respondents.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Gerd H. Henjes, the petitioner above named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Eastern District of New York in favor of the respondents, entered upon a verdict directed in their favor by the Trial Court.

Jurisdiction.

The decision of the Circuit Court of Appeals was filed on January 4th, 1943. A petition for a re-hearing was filed on January 19th, 1943, and denied on January 23rd, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347).

Statement of Facts.

This action was originally brought against the respondents, on a policy of marine insurance, in the Supreme Court, County of Kings, New York. It was thereafter duly removed to the District Court for the Eastern District of New York and there tried before a jury. At the close of the entire case the Court directed a verdict for the respondents on the ground that the breach by the petitioner of a promissory warranty in the policy had been proved and was a complete defense to the suit (R., pp. 72-74).

In March, 1940, in consideration of a premium of $6300, respondents issued a valued, time marine insurance policy to the petitioner, covering for one year his vessels named in an attached schedule against the perils mentioned which included perils of the sea (R., p. 75; Exh. 1). During the next month the coverage of the policy was extended, by endorsement, for an additional premium, to include damage to the petitioner up to the limit, and for the time, stated for the loss, destruction or injury to his tugboat "Edwin Duke" from the perils covered by the original policy. The "Duke" was valued at $30,000 (R., p. 75).

Respondents' policy contained a promissory warranty which applied to the "Duke" that confined her use and

navigation to New York Harbor and nearby waters named, but "* * * with privilege to operate in Great South Bay via Fire Island Inlet, including operation in the Inlet, subject to obtaining fair weather reports prior to clearing New York Harbor and warranted not in excess of one vessel in tow; * * *" (R., p. 75).

During the policy period the "Duke" sank under circumstances hereafter related and became a total loss. Petitioner duly filed proof of claim; respondents refused to recognize any liability under their policy, and this suit was instituted with the result noted.

The "Duke" was a steel tugboat sixty-nine feet long, having two hundred horsepower from a Diesel engine. Her loss occurred in the following manner:

After getting the required fair weather report the tug left New York Harbor on the evening of December 3rd, 1940, with one barge loaded with rock in tow for Fire Island Inlet. After passing the fairway buoy off Rockaway Point she became part of a tow made up of the five hundred horsepower tug "Gerd Henjes", also owned by petitioner, which had been towing two rock laden barges and petitioner's two hundred and forty horsepower tug "Helen Barbara" which had been towing another barge also loaded with rock.

This combined tow, with the "Henjes" in the lead followed in tandem by her barges, the "Duke" with its barge, and the "Barbara" with its barge, proceeded without trouble to Fire Island Inlet where the barges were left. About a quarter past one in the afternoon of the next day, December 4, 1940, the three tugs left the Inlet bound west for the Coney Island seawall. They then were in a tow made up in tandem, in charge of the "Henjes'" captain, which consisted of the "Duke" in the lead with a hawser to the tow of the "Barbara" that had in turn a hawser from her stern to the bow of the "Gerd

Henjes" which had four empty barges hanging in tandem from a hawser on her stern.

When the tow left the Inlet the weather was clear and the sea calm. After it had gone westward at full speed for about three hours the weather changed. The wind came up from the southwest to reach a velocity of around thirty miles an hour about five o'clock, and the sea came up with it until by half past six the waves were running about twenty-five feet high. The flotilla kept on very slowly after this change in weather.

Between six and seven o'clock the "Henjes'" captain reported to the "Duke's" captain, by radio telephone, that his hawser to the barges had parted and directed the "Duke" to cast off and come back to help pick up the barges. The "Duke" did so but before it could help, the "Henjes" had succeeded in making fast to the barges again, and the "Duke" thereupon resumed its position at the head of the tow. The same thing occurred with the same result about half past seven.

About a quarter past eight more serious trouble occurred. The men on the barges, there being two on each barge, began flashing lights to the "Henjes," and its captain ordered the "Duke" to cast off and go back to help them. The "Duke" complied and found that the last three barges had broken away from the first and were rapidly drifting toward the shore. The "Duke's" master testified that his object in going back to the barges was to save their crews (R., pp. 21, 23).

After considerable difficulty the "Duke" succeeded in heaving a line to the first of the three barges and getting a hawser fast to its center bitt. When the "Duke" attempted to tow the barges, however, it found that it could make no headway and was pulled with them toward the shore until it touched bottom (R., pp. 24, 46). Finding it impossible under the prevailing weather conditions to

save the barges and their crews, and in order to avoid danger to the tug and its crew, the "Duke's" captain cut loose from the barges and brought the tug out into deep water (R., p. 24).

He thereupon reported to the "Henjes'" captain, by radio telephone, asking him to try to get help from the Coast Guard for the men on the barges and telling him that the "Duke" would try to make Coney Island. After cutting loose from the barges at about 8:40 P. M. (R., pp. 25, 26, 57), the tug appears to have navigated her course for about three-quarters of an hour without difficulty (R., pp. 53, 58-59), until about half past nine that night, when she sent out distress signals (R., pp. 25, 26). During this period, while the tug was running light, the severity of the storm intensified considerably (R., p. 57).

About half past nine, after the tug had suffered severely in the wind and waves, and had been well nigh swamped by the mountainous waves which swept over her (R., pp. 24-25, 58, 59), its captain saw a light about five miles out to sea, on his port hand, and sent out distress signals which were answered by signals showing that the approaching vessel was a Coast Guard boat. The Coast Guard cutter soon came up and took the captain and crew off the tug, then so low in the water that all attempts to tow her were futile. The tug thereafter sank and was a total loss. Subsequent efforts to locate the vessel proved unavailing (R., p. 31).

The Decision of the Circuit Court of Appeals.

The Court below held that the towage warranty was a promissory warranty whose breach merely suspended the insurance during the time the breach remained uncured, and that the insurance would reattach when the breach was ended. In this connection, the Court held that in

assisting in the tow of more than one vessel (on the east and westbound voyages) the "Duke" breached the towage warranty, that this breach continued even after she cast off from the flotilla to go to the rescue of the crews aboard the three barges, and did not terminate until she cut away from the barges.

At the time of the loss, the Court held, the "Duke" was not towing in violation of the warranty. Notwithstanding this circumstance, and despite the fact that the tug did not sink until approximately two hours after she had cast off from the barges and abandoned her rescue effort, the Court held that plaintiff had failed to overcome the effect of the supervening breach, and, accordingly, affirmed the judgment.

In reaching this result the Court held, as a matter of law, that the "Duke" had been mortally wounded during her rescue effort, and that such effort, as a matter of law, did not constitute an attempted salvage. Accordingly, the Court reasoned that the injury was sustained during the period of breach, and, hence, that petitioner was precluded from having a recovery for his loss. Petitioner maintains that in arriving at these conclusions the Court erred.

Presumably, had the Court found that the rescue effort constituted an attempted salvage it would have held, in accordance with the established rule applicable in such a situation, that defendants were responsible for the loss notwithstanding that it might have resulted by reason of the attempted salvage. The Court held, however, as a matter of law, that it was the "Duke's" duty to go to the assistance, as she did, of the three barges which had broken away (notwithstanding that the undisputed facts established, and the Court found, that the tug was too small for the job), and that this was a continuing duty which prevented her from being treated as an attempting salvor to avoid the warranty in the policy.

The Court held further that there was no fair question of fact to be decided by the jury as to the actual cause of the loss; being of the opinion that in touching bottom during the attempted rescue, the vessel suffered an injury which occasioned her subsequent sinking after the insurance reattached. In giving conclusive effect to this circumstance, it would appear that the Court overlooked completely other evidence in the record which established, at least to the extent of making the question one of fact for a jury, that the loss actually was caused solely by perils encountered after the "Duke" had cut loose from the barges and after the breach had terminated.

The Trial Court, it is noteworthy, held that the rescue effort did constitute an attempted salvage, and directed a verdict for respondents solely on the ground that the towage warranty had been breached by the "Duke" combining in a tandem which comprised more than one vessel (R., pp. 72-74). The Trial Court does not appear to have considered whether the loss was occasioned by injury sustained during the attempted rescue, or by circumstances occurring subsequent thereto. Sufficient evidence was presented, however, to justify a finding by a jury that the sinking resulted from injury sustained after the insurance reattached.

Principal Questions Presented.

1. Whether a towing vessel which in going to the aid of her tow renders a service that is concededly hazardous and beyond her fair capacity of performance is not thereby performing an extraordinary service, one far beyond her normal obligation to her tow, and one, therefore, which requires her to be treated as an attempting salvor, thereby avoiding a towage warranty of the character here involved.

2. Whether a towing vessel which, in response to the statutory mandate to save life in distress on the seas (46 U. S. C. A., sec. 728), undertakes to rescue the crews of her tow is not thereby rendering a salvage service, regardless of any obligation to save the tow itself.

3. Whether under the circumstances mentioned in the previous questions there is not presented, in any event, an issue of fact as to whether the rescue effort constituted an attempted salvage, which the petitioner is entitled to have determined by a jury.

4. Whether the Circuit Court of Appeals may give conclusive effect to evidence pointing to one theory of loss which negatives recovery by the assured, thereby depriving him of a jury trial, where there is abundant competent and material evidence in the record establishing a cause for the loss which would sustain a recovery by the assured.

Specifications of Error.

1. The Court below erred in holding that there was a continuing duty upon the "Edwin Duke" to go to the assistance of the barges which prevented her from being treated as an atempting salvor to avoid the towage warranty.

2. The Court below erred in failing to hold that upon the undisputed facts of this case the rescue effort constituted an attempted salvage, sufficient to avoid the towage warranty.

3. The Court below erred in failing to hold that upon the facts in this case the question whether the "Duke"

was an attempting salvor presented at least an issue of fact for the jury.

4. The Court below erred in holding that there was no fair question of fact to be decided by the jury as to the actual cause of the "Duke's" loss.

5. The Court below, in holding that there was no fair question of fact to be decided by the jury as to the actual cause of loss, erroneously gave conclusive effect to evidence claimed to sustain respondents' theory of the loss, and erroneously failed to give due weight and effect to other evidence in the case which established that the loss was caused under circumstances which justified a recovery by petitioner, or at least required submission of the entire issue to the jury.

6. The Court below erred in failing to consider the evidence in the light most favorable to the petitioner.

7. The Court below erred in holding that the Trial Court had properly directed a verdict for the respondents.

Reasons for Allowance of the Writ.

1. In holding on the facts at bar that there was a continuing duty upon the "Duke" to go to the assistance of the barges which prevented her from being treated as an attempting salvor, and that by reason of such circumstance the towage warranty was not avoided, the Court below decided a federal question, to wit, a question arising under 46 U. S. C. A., sec. 728, and an important question of marine and insurance law all in a way that seems untenable and in conflict with the decision of the Trial Court on this phase of the case, and in conflict with its prior decision in *The Jos. F. Clinton*, 250 Fed.

977, and in conflict with applicable decisions of this Court and other Circuit Courts and in conflict with the weight of authority, all as more fully appears from the cases and argument under Point I of the annexed brief.

2. In holding that there was a continuing duty upon the "Duke" which prevented her from being treated as an attempting salvor, the Court below, in effect, imposed upon the tugboat the liability and obligations of an insurer, thereby deciding an important question of marine law in conflict with the weight of authority and with the applicable decisions of this Court and other Circuit Courts, as more fully appears from the cases cited under Point I of the annexed brief.

3. The decision of the Court below imposes a new, and unduly onerous, burden upon towing vessels. It compels them, under the guise of holding that they owe a duty of assisting their tows, to render aid even though it be beyond their ability, and notwithstanding that the rendition of such aid may expose the towing vessel and its crew to great danger. It extends beyond all proper limits the heretofore accepted and sound doctrine that a towing vessel is required to make only a reasonable effort to safe its tow. It nullifies the well established principle that the rendition of an extraordinary service by a towing vessel constitutes a salvage. The decision below is so manifestly fraught with dangerous possibilities of far reaching consequence in the maritime field, and is in such sharp conflict with the weight of authority, as more fully shown under Point I of the annexed brief, that it would seem eminently desirable that this Court exercise its power of review to correct and prevent the perpetration of the error committed below.

4. In failing to hold that there was at least a question of fact for the jury as to whether, in the circum-

stances at bar, the "Edwin Duke" was an attempting salvor, the Court below has deprived petitioner of his right to a jury trial on a vital and decisive issue in the case, and has thereby so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as more fully appears under Point I of the annexed brief.

5. In holding that there was no fair question of fact to be decided by the jury as to the actual cause of the loss, the Court below erroneously gave conclusive effect to evidence tending to sustain respondents' theory of the loss, and erroneously failed to give due weight and effect to other evidence in the case which established a loss under circumstances entitling petitioner to a recovery, thereby improperly substituting its own judgment on issues of fact properly determinable by a jury, and thereby failing to consider the evidence in the light most favorable to the petitioner, and thus so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as more fully appears from the cases and argument under Point II of the annexed brief.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination and decree of the Court below be reversed; and that petitioner be granted such other and further relief as may be proper.

GERD H. HENJES,
Petitioner.

By MORRIS EHRLICH,
Counsel for Petitioner.

Dated, New York, April 16, 1943.